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Supreme Court of the United States

OCTOBER TERM, 1940

No. 379

THE CUNARD STEAM-SHIP COMPANY, LIMITED,
Petitioner,
vs.
JOHN T. CLARK & SON, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Statement

This brief is being submitted by the respondent John T. Clark & Son, Inc. (hereinafter designated "Clark"), in opposition to the petition of The Cunard Steam-Ship Company, Limited (hereinafter designated "Cunard"), the petitioner herein, for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

Nature of Action

The action giving rise to the present proceeding was a maritime tort action commenced by one Peter Caldarola, a longshoreman employed by Clark, against Cunard, in the United States District Court, Eastern District of New

York, to recover damages for personal injuries allegedly sustained by said plaintiff on August 17, 1956, while he was engaged in the performance of his duties as a longshoreman aboard the S.S. *Media*, a vessel owned and operated by Cunard, in the Port of New York. Clark was the stevedoring contractor in charge of said operations (Petitioner's Appendix A, pp. 1a-2a).

Caldarola claimed that, while he was descending an iron ladder affixed to the deckhouse near the No. 6 hatch of the vessel, his foot slipped on some grease on the top rung of the ladder, causing him to fall to the deck below and to sustain the injuries of which he complained (Petitioner's Appendix A, p. 3a). Although he claimed that he had previously observed the grease on the rung of the ladder when he ascended same only a few minutes before the accident occurred, there was no proof as to how the grease got on the ladder or how long it had been there. Furthermore, there was no proof that either Cunard, the owner of the vessel, or Clark, the stevedoring contractor, were aware of its presence (Petitioner's Appendix A, pp. 10a-11a).

The complaint of Caldarola in his action against Cunard sought a recovery on the theory of negligence, as well as on the theory of unseaworthiness. The District Court, however, dismissed the negligence count on the ground that no proof of negligence on the part of Cunard was adduced at the trial, and submitted the main action to the jury solely on the theory of unseaworthiness (Petitioner's Appendix A, p. 3a).

In addition to denying the material allegations of Caldarola's complaint, Cunard served a third-party complaint on Clark, seeking judgment over against said stevedoring contractor on the theory of breach of implied warranty to perform the stevedoring operations in a reasonably safe and workmanlike manner (Petitioner's Appendix A, p. 3a).

Only the issues in the main action by Caldarola against Cunard were submitted to the jury, it having been duly stipulated by counsel that the issues raised by the third-party complaint of Cunard against Clark be reserved for decision by the District Court (Petitioner's Appendix A, p. 1a).

Decisions Below

Following a jury verdict in favor of Caldarola in the main action (based solely on the theory of unseaworthiness), judgment in the sum of $6,500.00 was entered in favor of said plaintiff and against Cunard. Based on the District Court's finding that "The failure to maintain the area (*i.e.*, the rung of the ladder) in a reasonably safe condition was a breach by the third-party defendant of its implied agreement to perform the work in an efficient, safe and workmanlike manner", judgment over in said amount was entered in favor of Cunard and against Clark under the third-party complaint (Petitioner's Appendix A, pp. 4a-5a).

In an opinion reported at 279 F. 2d 475—which will be found at pages 6a-11a of Petitioner's Appendix A—the Court of Appeals for the Second Circuit unanimously affirmed the judgment in favor of Caldarola and against Cunard, but reversed the judgment over in favor of Cunard and against Clark entered on the third-party complaint.

In reversing the judgment over in favor of Cunard and against Clark, the Court of Appeals, *per* Lumbard, C. J., held (Petitioner's Appendix A, pp. 10a-11a):

> "Clark's appeal from the decision that it breached its contractual duty to perform its services in a safe and workmanlike manner challenges the sufficiency of the evidence to support this finding. The contract between Clark and Cunard stated that the former would 'provide all necessary stevedoring labor, in

cluding winchmen, * * * foremen and such other supervision as may be required for the proper and efficient discharging of the cargo or the loading of cargo into vessel's holds. * * *' Under this agreement Clark was not required to act as an insurer against any loss by Cunard or to discover and correct every hidden danger. Its duty was to perform its services with 'reasonable safety.' *Weyerhaeuser S.S. Co.* v. *Nacirema Operating Co.*, 355 U. S. 563 (1958); *Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Corp.*, 350 U. S. 124 (1956).

There was no evidence in the case before us that the stevedore or any of its employees knew of the grease on the ladder until plaintiff placed his hand in it as he climbed to the roof of the deckhouse a few minutes prior to the accident. This knowledge acquired by the plaintiff so short a time before he slipped was insufficient to put the stevedore on notice of the condition and give it an opportunity to remove the grease or to have the ship's crew do so before the accident. Cf. *Santomarco* v. *United States*, 2d Cir., April 5, 1960, slipsheet p. 1277. Furthermore, the evidence tended to show that the grease could have been present on the ladder for only a short time before the accident, and thus it would be unreasonable to require the stevedore to have discovered the grease in the course of the normal routine.

Absent knowledge or constructive notice of the presence of the grease, the stevedore could only have breached its contractual duty if the conduct of its employees created the dangerous condition. Upon this question, there was testimony by one of the plaintiff's fellow employees that a 'fall' or wire cable, which hung down from an unused boom that had been swung out of the way by the stevedores, was touching the ladder. However, one of the Media's officers gave evidence that this wire had not been greased

for some time, since such cables were only greased when the ship was at sea. And the plaintiff himself testified that the grease on the cable was dried and brittle, while the grease into which he placed his hand and upon which he slipped was light and fluid. Thus, there was no evidence whatever that the grease which caused the accident came from the cable which the longshoremen had permitted to rest against the ladder.

The trial court's determination that Clark breached its contract to perform its duty in a safe and workmanlike manner was without foundation in the evidence and must be reversed."

Cunard thereafter filed a petition for a rehearing as respects the determination thus made, but its petition was denied by the Court of Appeals (Petitioner's Appendix A, p. 14a).

The Issue

In support of its petition for a writ of certiorari herein, Cunard contends that the decision of the Court of Appeals, "in equating the steyedore's warranty with the duty to use due care, is in conflict with the decision of this Court in the *Ryan* case on a point of great practical significance", and that the decision of the Court of Appeals is "both erroneous and at variance with the decision of the Court of Appeals for the Fourth Circuit in *Calman S.S. Corp. v. Nacirema Operating Co., Inc.*" 266 F. 2d 79 (Petition, pp. 4-5).

FIRST POINT

There is no conflict between the decision of the Court of Appeals herein and the decision of this Court in *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic S.S. Corp.*, 350 U. S. 124 (1956), or the decision of the Court of Appeals for the Fourth Circuit in *Calmar S.S. Corp.* v. *Nacirema Operating Co.*, 266 F. 2d 79 (1959).

Ryan Stevedoring Co., Inc. v. *Pan-Atlantic S.S. Corp.*, *supra*, and *Calmar S.S. Corp.* v. *Nacirema Operating Corp.*, *supra*, are plainly distinguishable from the case at bar on their facts.

In the *Ryan* case the evidence established, and the Circuit Court of Appeals for the Second Circuit expressly found, that Ryan, the stevedoring contractor, "*created* the hazardous condition", which caused the injury to the longshoreman "by its improper stowage of the pulp paper rolls at Georgetown" (*Palazzolo* v. *Pan-Atlantic S.S. Corp.*, 211 F. 2d 277, 279—Italics ours). Consequently, the only question before this Court was, as Mr. Justice Burton stated in the very first paragraph of the majority opinion, "whether liability exists where a contractor, without entering into an express agreement of indemnity, contracts to perform a shipowner's stevedoring operations and the longshoreman's injuries are caused by the contractor's unsafe stowage of the ship's cargo." In answering this question in the affirmative, the Court stated at page 133 of its opinion that the stevedoring contractor's agreement to perform the stevedoring operations "necessarily includes petitioner's obligation not only to stow the pulp rolls, but to stow them properly and safely" and that, as a consequence, "Competency and safety of stowage are inescapable elements of the service undertaken." Finally, in concluding its opinion, the Court stated that "Whatever may have been the respective obligations of the stevedoring contractor and of the shipowner to the injured

longshoreman for proper stowage of the cargo, it is clear that, as between themselves, the contractor, as the warrantor of its own services, cannot use the shipowner's failure to discover and correct the contractor's own breach of warranty as a defense" (pp. 134-135).

In the *Calmar* case the Court of Appeals for the Fourth Circuit likewise expressly found that the accident resulting in the longshoreman's injury was caused, in part at least, by the fault of the stevedoring contractor. At page 80 of its opinion the Court of Appeals took pains to point out that the deckman of the stevedoring contractor "not only accepted and used the unseized light" supplied by the vessel for the work being performed in the No. 4 hold of the *S.S. Portmar*, but that he thereafter "threw it over the side of the hold so roughly that the light was jerked from the cable" to which it was attached and then "fell into the hold, injuring the plaintiff."

In the case at bar there is no proof from which it can be inferred that Clark was in any way responsible for the presence of the "light and fluid" grease on the top rung of the iron ladder affixed to the deckhouse alongside the No. 6 hatch, which caused the accident resulting in the injury to Caldarola, and the Court of Appeals in the Second Circuit expressly so found (Petitioner's Appendix A, p. 11a). As far as the proof adduced at the trial is concerned, this grease may well have come from the shoe of one of the members of the *S.S. Media's* own crew who were using the ladder while the stevedoring operations were in progress.

The case at bar is also distinguishable, on this same basic ground, from *Weyerhaeuser* v. *Xacirema Operating Co., Inc.*, 355 U. S. 563 (1958), and *Crumady* v. *The Joachim Hendrik Fisser*, 358 U. S. 423 (1958), two of the more recent cases wherein this Court has applied the doctrine of the *Ryan* case. In the *Weyerhaeuser* case the loose board which fell from the temporary winch shelter

and struck the longshoreman had previously been erected by the stevedoring contractor, while in the *Crumady* case the stevedoring contractor was found to have been negligent in creating a load on the topping-lift "greatly in excess of its safe working load", thus causing the boom to fall and strike the longshoreman. This Court accordingly held that "since the *negligence* of the stevedores, which brought the unseaworthiness of the vessel into play, amounted to a breach of the warranty of workmanlike service, the vessel may recover over" (p. 429—Italics ours).

In an endeavor to support its claim that there is a conflict between the *Ryan* and *Calmar* decisions and the decision of the Court of Appeals for the Second Circuit herein, the petitioner completely ignores the basic factual distinction between those cases and the case at bar. Instead, it lays great stress on the observation of this Court in the *Ryan* case that the implied warranty of a stevedoring contractor to perform his services in a reasonably safe and workmanlike manner is "comparable to a manufacturer's warranty of the soundness of its manufactured product". (*Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic S.S. Corp.*, 350 U. S. 124, 133-134). Solely on the basis of this observation, the petitioner argues that negligence or fault plays no part whatever in determining the liability of a stevedoring contractor for a breach of his implied warranty to perform his services in a reasonably safe and workmanlike manner. It is submitted that this conclusion finds no support in any of the reported cases.

Although there may be a general analogy between the warranty of a manufacturer with respect to the soundness of its manufactured product and the implied warranty of a stevedore to perform his services in a reasonably safe and workmanlike manner, there is a basic point of difference between the two warranties. Wherever a right of recovery exists against the manufacturer of a manufac-

tured product, in the absence of a showing of negligence or fault, such right arises solely by virtue of an express warranty created by statute (see *MacPherson* v. *Buick Motor Co.*, 217 N. Y. 382). In such a case the scope of the warranty is measured by the terms of the statute which creates it. The implied warranty of a stevedoring contractor to perform his services in a reasonably safe and workmanlike manner, on the other hand, is merely an incident of his contract of employment. The scope of the implied warranty must therefore be measured solely by the obligation imposed by the contract of employment itself. We know of no case which holds or suggests that a stevedoring contractor is required to do more than to exercise reasonable care in the performance of his work. This being so, it is submitted that it necessarily follows that the stevedoring contractor is liable only for a loss which proximately results from his failure to exercise such care—which, of course, means that it must be established that the loss was proximately caused by some negligence or fault on his part in the performance of his work.

As the Court of Appeals for the Second Circuit took great pains to point out in its opinion herein, the contract between Clark and Cunard did not make Clark "an insurer against any loss by Cunard", nor did it impose upon Clark the onerous duty "to discover and correct every hidden danger" aboard the *S.S. Media* arising from a condition not created by Clark or its own employees. On the contrary, it merely imposed upon Clark the duty to perform the stevedoring services covered thereby in a reasonably safe and efficient manner, or with "reasonable safety" (Petitioner's Appendix A, p. 10). There is no proof, as the Court expressly found, that Clark breached this duty in any way.

As the Court of Appeals further pointed out, "Absent knowledge or constructive notice of the presence of the grease, the stevedore could only have breached its contractual duty if the conduct of its employees created the

dangerous condition" (Petitioner's Appendix A, p. 11a). Granted, as argued by Cunard on page 8 of its petition herein, that "a master is liable for the negligent acts of his servant which injure a third party while the servant is acting within the scope of his employment", it does not follow from this that the observation of Caldarola that there was grease on the top rung of the ladder when he ascended it only a few minutes before the accident occurred was sufficient to convey notice, actual or constructive, to Clark itself of the existence of this purely temporary or transient condition of unseaworthiness aboard the vessel. Caldarola was not the *alter ego* of Clark aboard the S.S. *Media*. Any knowledge which he may have acquired as to the presence of the grease on the top rung of the ladder when he ascended the same only a few minutes before the accident therefore may not be imputed to his employer (*Schilling* v. *Delaware & H. R. Corp.*, 114 F. 2d 69, 71 [2nd Cir., 1940]; *Kuhn* v. *City of New York*, 273 N. Y. 118, 133-134 [1937]).

In principle, the case at bar is very similar to *Reddick* v. *McAllister Lighterage Line, Inc.*, 258 F. 2d 297 (2nd Cir., 1957), wherein this Court denied the petition of the owner of the lighter there involved for a writ of certiorari (358 U. S. 908).

In the *Reddick* case the Court of Appeals for the Second Circuit likewise reversed a judgment over in favor of the owner and against the stevedoring contractor (the same stevedoring contractor involved herein) on the ground that there was no negligence or fault on his part proximately causing the injury sustained by the longshoreman. If anything, the *Reddick* case was stronger than the case at bar because a majority of the Court were of the opinion that the stevedoring contractor had breached his contract to stow the cargo aboard the lighter in a reasonably safe and workmanlike manner. Even so, the Court reversed the judgment over in favor of the owner on the ground that the accident resulting in the longshoreman's injury

was not proximately caused by the negligent stowage of the cargo, but by a latent defect in a board on top of one of the crates stowed on the deck of the lighter, even though the negligent stowage of the cargo required the longshoreman to climb on top of the crate in order to place a sling around it.

CONCLUSION

The petition for a writ of certiorari herein should be denied.

Dated: New York, New York, September 19, 1960.

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